

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling To Clarify the
Applicability of the IntraMTA Rule to LEC- IXC
Traffic and Confirm That Related IXC Conduct
Is Inconsistent with the Communications Act of
1934, as Amended, and the Commission's
Implementing Rules and Policies

WC Docket No. 14-228

Comments of the
Multi-State Small Local Exchange Carrier Litigants

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Summary

The thirty Multi-State Small Local Exchange Carrier (“LEC”) Litigants (the “Small LEC Litigations”) operating in Georgia, Nebraska, New York and Pennsylvania demonstrate in these comments that the “Petition for Declaratory Ruling of the LEC Petitioners” filed November 10, 2014 (the “Petition”) should be granted in its entirety. The Small LEC Litigants also demonstrate that the Federal Communications Commission (the “Commission” or the “FCC”) should reject outright the claims that the “intraMTA rule” found in Section 51.701(b)(2) of the FCC’s rules applies to any traffic for which an Interexchange Carrier (“IXC”) has voluntarily used the LEC’s exchange access tariffed services. IXCs cannot be permitted to unilaterally change the existing tariffed exchange access arrangements provided by the LECs under an intraMTA rule theory concocted by the IXCs. An IXC is not a Commercial Mobile Radio Service (“CMRS”) provider and the intraMTA rule applies only in the context of the traffic exchanged between a CMRS provider and LEC under a Section 251/252 interconnection arrangement. Not only do the FCC’s rules and decision support this conclusion, but this conclusion is also supported by the application of the Filed Rate Doctrine. So too, retroactive refunds of such charges are impermissible under the Voluntary Payment Doctrine.

In the absence of granting the Petition and the relief requested by the Small LEC Litigants, an array of issues must be addressed by the Commission as outlined in the Petition and these comments. Of particular note, should it not outright reject the contentions regarding the intraMTA rule being made by the IXCs, the Commission must also address where the legal basis of the IXC’s claims are found in the Communications Act of 1934, as amended, and how any such legal right can be reconciled with the FCC rules and prior FCC decisions. Moreover, the Commission would need to address how any credence of the IXC’s concocted intraMTA rule can be reconciled with the rate-of-return (“ROR”) intercarrier compensation recovery mechanism

and the \$2 billion budget established for ROR carriers in the November, 2011 *USF/ICC Transformation Order*. Commission silence will only foster inefficient use of resources. Providing credence to the IXC's concocted intraMTA theory will result in a high number of questions that, as the Petitioners note, will need to be addressed on a case-by-case basis by the Commission and/or by the various courts.

Having already received a windfall from the use of the terminating LECs' networks at rates that are being reduced to zero, the IXCs are simply trying to concoct a new theory to add to that windfall at the expense of the LECs and their end users, together with the possibility of the IXCs retaining a further windfall associated with the retention of toll revenue associated with such traffic that could be reclassified. Thus, the IXCs' claims regarding the intraMTA rule should be rejected outright and the Petition and the relief requested by the Small LEC Litigants granted in their entirety.

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Comments of the
Multi-State Small Local Exchange Carrier Litigants

The thirty Multi-State Small Local Exchange Carrier ("LEC") Litigants (the "Small LEC Litigants") identified in Attachment A hereto¹ hereby file these comments in response to the

¹ Each of the Small LEC Litigants is a named defendant in a federal district court case filed by MCI Communications Services, Inc. and Verizon Select Services, Inc. The Small LEC Litigants note that the second case number provided is to the consolidated litigation in the United States District Court in the Northern District of Texas as discussed further below. *See MCI Communications Services, Inc. et al v. ACN Communication Services, Inc. et al.*, Case No. 1:14-cv-02878-RWS (U.S.D.C. for the N.D. GA) (Tx Case No. 3:14-cv-04561) (the "VZ GA ND Amended Complaint"); *MCI Communications Services, Inc., et al. v. Arlington Telephone Company, et al.*, Case No. 4:14-cv-03181-JMG-CRZ (U.S.D.C. in NE) (Tx Case No. 3:14-cv-04574) (the "VZ NE Complaint"); *MCI Communications Services, Inc. et al v. Berkshire Telephone Corporation et al*, Case No. 1:14-CV-1103 [TJM/RFT] (U.S.D.C. for the ND of NY) (Tx Case No. 3:15-cv-00022) (the "VZ NY ND Complaint"); *MCI Communications Services, Inc. et al v. Alteva of Warwick et al.*, Case No. 1:14-CV-7188 [JMF] (U.S.D.C. for the SD of NY) (Tx Case No. 3:15-cv-00045) (the "VZ NY SD Amended Complaint"); *MCI Communications Services, Inc. et al v. Fibernet Telecommunications of Pennsylvania, LLC et al*, Case No. 1:14-cv-01735-SHR (U.S.D.C. for MD of PA) (Tx Case No. 3:14-cv-04445) (the "VZ PA MD Complaint"); *MCI Communications Services, Inc. et al v. Armstrong Telecommunications, Inc. et al*, Case No. 1:14-cv-00240-JFM (U.S.D.C. for the WD of PA) (the "VZ PA WD Complaint") (Tx Case No. 3:15-cv-00228) (the "Small LEC Litigants Court Cases"). As indicated above, the Small LEC Litigants Court Cases have now been consolidated for certain matters in the United States District Court for the Northern District of Texas in Dallas, Texas. *See In Re: IntraMTA Switched Access Charges Litigation, Transfer Order with Simultaneous Separations and Remand of Certain Claims*, MDL 2587, filed December 16, 2014 (U.S. Judicial Panel on Multidistrict Litigation); *In Re: IntraMTA Switched Access Charges Litigation, Conditional Transfer Order*, MDL 2587, filed December 30, 2014 (U.S. Judicial Panel on Multidistrict Litigation); *see also In Re: IntraMTA Switched Access Charges Litigation*,

the November 10, 2014 “Petition for Declaratory Ruling of the LEC Petitioners” (the “Petition”) filed by over four hundred other LECs (the “Petitioners”) docketed as the above-captioned proceeding.² For the reasons stated herein, the Small LEC Litigants respectfully request that the Commission: (1) grant the Petition in its entirety; (2) reject outright the claims made regarding the “intraMTA rule”³ by various Interexchange Carriers (“IXCs”) (including MCI Communications Services, Inc. and Verizon Select Services, Inc. (collectively “Verizon”))⁴; and

Order, Civil Action No. 3:14-MD-2587-D (MDL No. 2587), filed December 19, 2014; *In Re: IntraMTA Switched Access Charges Litigation, Case Management and Scheduling Order No. 1*, Civil Action No. 3:14-MD-2587-D (MDL No. 2587), filed January 15, 2015. By these citations and references within these comments, none of the Small LEC Litigants are waiving any of their respective legal rights with respect to responses to the Verizon complaint filed against that Small LEC Litigant including, without limitation, all defenses and counter claims that they have the right to assert.

² In the *Public Notice* allowing for the submission of these comments, the Federal Communications Commission (the “Commission” or the “FCC”) specifically notes that “interested parties may file comments and reply comments in **WC Docket No. 14-228** on or before” February 9, 2015 for comments and March 11, 2015 for reply comments. *Wireline Competition Bureau Seeks Comment on Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic*, *Public Notice*, CC Docket No. 01-92, WC Docket Nos. 10-90, 14-228, DA 14-1808, released December 10, 2014 at 1 (emphasis in original).

³ The intraMTA rule at issue is found in Section 51.701(b)(2) of the FCC’s rules and states as follows:

(b) *Non-Access Telecommunications Traffic*. For purposes of this subpart, Non-Access Telecommunications Traffic means:

...

- (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.202(a) of this chapter.

47 C.F.R. § 51.701(b)(2). Section 24.202(a) of the Commission’s rules defines a Major Trading Area (“MTA”) as follows: “(a) The MTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39” with certain “exceptions and additions” that are not applicable to the Small LEC Litigants. 47 C.F.R. § 24.202(a).

⁴ For purposes of these comments, the reference to “IXCs” are to Sprint Communications Company, L.P. (“Sprint”), Level 3 Communications, LLC (“Level 3”) and Verizon.

(3) ensure that its decision leaves no doubt that the intraMTA rule provides no basis for the unilateral alteration of the exchange access arrangements that IXC⁵, including Verizon, have in place with LECs (a classification of carriers that includes the Small LEC Litigants) and for which payment by the IXC⁶ for usage is due and owing for alleged intraMTA traffic carried by the IXC over those exchange access arrangements.⁶ Having already received a windfall by the use of the terminating LECs' networks at rates that are being reduced to zero, the IXC⁶ are simply trying to concoct a new theory to add to that windfall at the expense of the LECs and their end users, together with the possibility of the IXC⁶ attempting to retain a further windfall associated with the retention of toll revenue associated with such traffic that could be reclassified. Accordingly, for all of the reasons stated herein and those contained in the Petition, the Small LEC Litigants respectfully request that the relief described in the Petition be promptly granted.

I. SUMMARY OF POSITION

For purposes of these comments supporting the expeditious grant of the Petition, the Small LEC Litigants assume *arguendo* that the following facts alleged by the IXC⁶ are accurate. First, the Small LEC Litigants will assume that the IXC⁶ have *in fact* carried and currently *do* carry some level of Commercial Mobile Radio Service ("CMRS") traffic over the exchange

⁵ Based on their understanding of the scope of the IXC⁶'s claims regarding the intraMTA rule, the Small LEC Litigants understand and agree with the Petitioners that Sprint and Level 3 have made similar claims to those Verizon has made. *See* Petition at 4. Some of the Small LEC Litigants denied disputes with Level 3 regarding the claims that Level 3 has made and some have experienced the withholding of otherwise properly due and owing exchange access charges by Level 3.

⁶ Because the MTA boundaries may cross states lines from those in the various states in which the Small LEC Litigants operate, the access services for which charges are in dispute are, based on the jurisdiction of the traffic at issue, required to be addressed under the terms and conditions of *either* a Small LEC Litigant's interstate exchange access tariff or that company's intrastate exchange access tariff. *See* fn. 14 (and accompanying text) and fn. 15, *infra*.

access arrangements that the IXC's have in place with the Small LEC Litigants, *i.e.*, traffic that is originated by an end user located in a Small LEC Litigant's service area and is destined for a CMRS provider, or traffic that is originated by a CMRS provider's end user and is destined to terminate to an end user located in a Small LEC Litigant's service area. Second, the Small LEC Litigants will assume that at least some of this traffic is originated and terminated within the MTA in which the Small LEC Litigant provides its exchange access services to the IXC's. The Small LEC Litigants make these assumptions but disagree with the assertion that the characterization of the traffic by the IXC's is correct or that any demonstration by the IXC's has been made that the traffic at issue does *in fact* originate and terminate within a MTA.

With these understandings, the Small LEC Litigants respectfully submit that prompt resolution of the issues presented in the Petition will advance the public interest. Granting the Petition will ensure the continued integrity of the Commission's rules, decisions and policies that are applicable to these circumstances.

Verizon, Level 3, and Sprint are each sophisticated telecommunications carriers and know full well their rights and responsibilities associated with the telecommunications services, and in particular the LEC exchange access services that the IXC's have ordered and used so that the IXC's can provide a finished telecommunications service to their respective users. If Verizon, for example, desires to change the exchange access arrangements that it has in place with each of the Small LEC Litigants, it possesses procedures provided by law pursuant to which it may seek to do so. Yet Verizon has not sought to do so. Rather, Verizon has concocted the theory that the intraMTA rule applicable solely to traffic exchanged between CMRS providers and LEC's can now be applied to traffic between an IXC and LEC. That theory has no basis and should be rejected outright by the Commission.

Under the facts alleged by Verizon, Verizon is not functioning as a CMRS carrier. It is providing interexchange service and thus is an IXC. Verizon has voluntarily elected to use the exchange access services provided by the Small LEC Litigants and, initially, voluntarily paid for the services Verizon chose to use under the applicable terms and conditions of the exchange access tariffs of the Small LEC Litigants. Verizon does not provide any lawful basis for the elimination or rebate of these tariffed charges. Verizon may not unilaterally alter the exchange access interconnection arrangements that it has in place with a Small LEC Litigant either on a retroactive or prospective basis under Verizon's theory that the subject traffic carried by it is intraMTA CMRS traffic.

Assuming *arguendo* that the FCC gives credence to any of Verizon's contentions, the Small LEC Litigants respectfully submit that, consistent with the Petitioners' observation, there will be the unquestioned need for the Commission to address a number of issues regarding implementation of any grant of relief to the IXCs, let alone the need for Verizon's claims to be reconciled with existing FCC policies and mechanisms. The need for Commission action is particularly necessary for the Smaller LEC Litigants so that they are provided with a clear statement of their respective legal rights and obligations. The Commission must explain its decision in sufficient specificity so as to allow the Small LEC Litigants to address their legal interests when, to date, they have conducted their respective operations in compliance with their tariffs and, as applicable, with their respective obligations under Section 251(b) of the Communications Act of 1934, as amended (the "Act").

In addition to the explanation that Petitioners note, the Commission's explanation must also include the demonstration of where any new interconnection right for an IXC can be established without running afoul of the Act's directives. Moreover, any relief provided to the

IXCs must address the impact on the funding of the FCC's rate of return ("ROR") carrier Recovery Mechanism vis-à-vis the \$2 Billion budget levels for the ROR universal service and intercarrier compensation programs established by the Commission in the *USF/ICC Transformation Order*.⁷

Commission silence on these issues will only foster inefficient use of resources since, as noted by the Petitioners, providing credence to the IXC's concocted intraMTA theory will result in "dozens of questions that will need to be resolved on a case-by-case basis by the Commission and/or various courts."⁸ A grant of the Petition and the relief requested by the Small LEC Litigants will avoid this need for these Commission explanations.

II. THE FACTS OUTLINED IN THE PETITION FOR DECLARATORY RULING APPLY TO THE SMALL LEC LITIGANTS

A. The Small LEC Litigants.

The Small LEC Litigants are predominantly incumbent local exchange carriers ("ILECs"), as that term is defined in the Act.⁹ Likewise, each of the Small LEC Litigants is or

⁷ See, e.g., *In the Matter of Connect America Fund, et al., Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 *et al.*, 26 FCC Rcd 17663 (2011), *aff'd* In Re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014), *pet. for cert. pending* ("*USF/ICC Transformation Order*") at ¶ 126.

⁸ Petition at 9.

⁹ The Act defines an "incumbent local exchange carrier" as follows:

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -

- (A) on February 8, 1996, provided telephone exchange service in such area; and
- (B) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

could be classified as a “rural telephone company” as that term is defined under the Act.¹⁰ The Small LEC Litigants are predominantly ROR carriers for purposes of their respective interstate exchange access offerings under applicable Commission rules,¹¹ regulations and policies established, in part,¹² by the *USF/ICC Transformation Order*.¹³ Moreover, except as noted herein, the Small LEC Litigants are predominantly “Issuing Carriers” under the National Exchange Carrier Association, Inc. F.C.C. Tariff No. 5 (“NECA 5”) for their respective provision of interstate exchange access services¹⁴ and each has a filed and has in effect a state exchange access tariffs or access catalogs under applicable state commission requirements.¹⁵

47 U.S.C. § 251(h)(1). Huntel Cablevision, Inc. (“Huntel”) is not an ILEC but is a competitive local exchange carrier operating in specific areas of Nebraska outside of Omaha.

¹⁰ Each of the Small LEC Litigants meets the definition of a “rural telephone company” under Section 153(44) of the Act because, among other reasons that may apply to one or more of the Small LEC Litigants, each of the Small LEC Litigants “provides telephone exchange service, including exchange access, to fewer than 50,000 access lines.” 47 U.S.C. § 153(44)(B).

¹¹ See 47 C.F.R. § 54.5 (“*Rate-of-return carrier*. ‘Rate-of-return carrier’ shall refer to any incumbent local exchange carrier not subject to price cap regulation as that term is defined in § 61.3(ee) of this chapter.”). Huntel is not a ROR carrier.

¹² See, e.g., 47 C.F.R. § 54.917 (Revenue recovery for Rate-of-Return Carriers).

¹³ Only certain of the applicable ROR carrier-related rules were modified or established by the *USF/ICC Transformation Order*, while other existing ROR carrier-related rules were not. Compare *USF/ICC Transformation Order*, Appendix A and 47 C.F.R. § 36.1 *et seq.*, 69.1 *et seq.*

¹⁴ The following companies have issued their own interstate tariffs or are issuing carriers in other interstate tariffs filed with the FCC: Ellijay Telephone Company (issuing carrier in the John Staurulakis, Inc. Tariff F.C.C. No. 1); and Huntel (issuing carrier in Huntel Communications Tariff F.C.C. No. 1).

¹⁵ Each of the Small LEC Litigants operating in Georgia uses the terms and conditions of NECA 5 that, depending on what section of the tariff is at issue, were in effect on either July 1, 2010 or July 1, 1991, with certain Georgia-specific modifications made thereafter. In Nebraska, The Nebraska Central Telephone Company and Northeast Nebraska Telephone Company concur in the Nebraska Independent Telephone Association Access Service Catalog; Arlington Telephone Company, Blair Telephone Company, Eastern Nebraska Telephone Company, Rock County Telephone Company and Huntel, also companies operating in Nebraska, utilize the Access Service Catalog of Huntel, Inc. d/b/a American Broadband Nebraska, Inc.; and Great Plains Communications, Inc. has filed its Great Plains Communications, Inc. Tariff No. 2; the

B. The Facts Outlined in the Petition are Equally Applicable to the Small LEC Litigants.

The Small LEC Litigants confirm the facts set forth in the Petition regarding the positions and contentions of the IXCs regarding the intraMTA rule. Specifically, like the Petitioners, each of the Small LEC Litigants note that Verizon is attempting to dispute charges associated with traffic that it alleges is delivered to or originated from a CMRS provider through the trunking arrangements that each of the Small LEC Litigants has in place for exchange access.¹⁶ Moreover, for originating long distance calls, each Small LEC Litigant confirms that it delivers traffic dialed on a “1+” basis to the presubscribed IXC of the originating end user.¹⁷ The Verizon form letter that advised companies of its dispute of LEC billings for intraMTA access charges, dated September 3, 2014, was in some cases received by Small LEC Litigants after the date of Verizon’s filing litigation, and in other cases essentially contemporaneously with the institution of the litigation. Each of the Small LEC Litigants confirm that Verizon provided no explanation prior to the initiation of the disputes or litigation as to how the traffic in question would be identified as CMRS-related traffic¹⁸ Further, payment by Verizon for the exchange access services it used was and had been historically received by each of the Small LEC Litigants without any notice that Verizon disputed the charges for such exchange access

Hamilton Telephone Company has filed its Hamilton Telephone Company Access Catalog. Each of the Small LEC Litigants operating in New York uses the New York Intrastate Access Settlement Pool, Inc., P.S.C. No. 3. Each of the Small LEC Litigants operating in Pennsylvania uses the Pennsylvania Telephone Association, PA PUC Tariff No. 11. In each instance, the referenced intrastate tariffs have been issued and are in effect and have been filed with the applicable state public service commission or state public utilities commission.

¹⁶ See Petition at 4.

¹⁷ See *id.*

¹⁸ See *id.* at 4-5.

services.¹⁹ As a general matter, each of the Small LEC Litigants is also aware of existing transit arrangements through which a LEC delivers traffic that properly falls within the FCC's definition of "Non-Access Telecommunications Traffic"²⁰ --whether from a CMRS provider or some other competing LEC -- to the ILEC tandem the LEC subtends.²¹ Some of the Small LEC Litigants have interconnection agreements in place that permit these types of arrangements.²² Accordingly, the arrangements and circumstances underlying the Petition and the need for the relief that the Petitioners seek are applicable to each of the Small LEC Litigants.

III. NEITHER RETROACTIVELY NOR PROSPECTIVELY IS VERIZON ABLE TO SUSTAIN ITS CLAIM THAT IT IS PERMITTED TO UNILATERALLY ALTER ITS EXISTING EXCHANGE ACCESS ARRANGEMENTS WITH THE SMALL LEC LITIGANTS

As noted above, Verizon's contention that it can utilize the intraMTA rule in an effort to avoid paying for the exchange access services it uses cannot be sustained. Verizon's position appears to be based on the false premise: notwithstanding its past voluntary payment of exchange access charges, Verizon may unilaterally alter the tariffed exchange access arrangements that it has in place with LECs such as each of the Small LEC Litigants, both on a retroactive and prospective basis, so as to exclude intraMTA traffic from that arrangement. No such right exists. Verizon's contentions should be rejected in their entirety.

¹⁹ *See id.* at 5.

²⁰ *See* 47 C.F.R. §51.701(b).

²¹ *See id.* at 16.

²² *See generally id.* at 16, 17.

A. Verizon's Contentions that It may Alter the Exchange Access Arrangements It has Entered into as an IXC are Contrary to Existing FCC Rules and the Underlying Requirements of the Act.

The Commission should reject Verizon's effort to unilaterally alter the exchange access arrangements it has in place and thereby exclude traffic that it handles as an IXC from the application of tariffed exchange access charges. Verizon's contentions are contrary to the existing FCC rules and orders and otherwise conflict with the underlying requirements of the Act.

First, Verizon improperly contends that the FCC's discussion in paragraphs 1003, 1004, and 1007 of the *USF/ICC Transformation Order* regarding intraMTA traffic,²³ and the case law noted in footnotes 2132 and 2133 thereof, allow Verizon to exclude purported intraMTA traffic from the traffic carried over the exchange access arrangements it has ordered. Effectively, Verizon attempts to use the referenced discussion within the *USF/ICC Transformation Order* to create a loophole that it seeks to exploit by allowing an IXC to stand in the shoes of a CMRS provider vis-à-vis the intraMTA rule. The Commission should reject this attempt.

The Small LEC Litigants respectfully submit that there can be no logical conclusion reached other than that the referenced discussion within the *USF/ICC Transformation Order* relates to the treatment of traffic exchanged between a CMRS provider and a LEC. The discussion in paragraph 1007 unequivocally states that reciprocal compensation applies to "all traffic that is exchanged *between a LEC and a CMRS provider* that originates and terminates within the same MTA . . . regardless of whether the *two end carriers are directly connected or*

²³ VZ GA ND Amended Complaint at 21-23; VZ NE Complaint at 8-10; VZ NY ND Complaint at 9-10; VZ NY SD Amended Complaint at 10-11; VZ PA MD Complaint at 10-12; VZ PA WD Complaint at 8-9.

*exchange traffic indirectly via a transit carrier.*²⁴ Nowhere does Verizon claim to be a CMRS provider; nowhere does the FCC indicate that a CMRS carrier is the same as an IXC; and nowhere does the FCC state that IXCs can stand in the shoes of the CMRS as effectively would need to happen if Verizon's claims were to be accepted.²⁵ Rather, the FCC's discussion focuses on only two types of entities: the LEC and CMRS provider or the "two end carriers." In both instances the FCC is referring to the same entities and not to an IXC.²⁶

If there were any doubt regarding the foregoing analysis, footnote 2132 of the *USF/ICC Transformation Order* resolves that doubt. Footnote 2132 states that, in addressing the challenges of classifying a call as either "interMTA" or "intraMTA" traffic, "the Commission addressed this concern when it adopted the [intraMTA] rule" noting that "parties may calculate

²⁴ *USF/ICC Transformation Order* at ¶ 1007 (emphasis added).

²⁵ The Small LEC Litigants also note that the "reciprocal compensation" portions of the Commission's rules – in which the intraMTA rule is placed – do not include the term "interexchange carrier". Other than in the definition of "telecommunications carrier" found in 47 C.F.R. § 51.5, it is only in the context of presubscribed carrier charges that the term "interexchange carrier" is used. See 47 C.F.R. § 51.617 (addressing charges to and associated with interexchange carriers in the context of reselling incumbent LEC services).

²⁶ Even if Verizon claims that it is some form of a "transit" provider, and that such a transit provider is the same as an IXC, that claim is without merit. As opposed to a LEC, an IXC provides telephone toll service. See 47 U.S.C. § 153(55). A transit provider is not a LEC and is not even referenced in the very intraMTA rule – 47 C.F.R. § 51.701(b) – that Verizon points to as the rule basis for its effort to avoid the access charges at issue. The lack of a reference to a "transit" provider within Section 51.701(b) is not surprising, however, since "transit" has not been found by the FCC to be an interconnection obligation of an incumbent LEC or any other LEC. See, e.g., *In the Matter of Petition of Worldcom, Inc. et al., Memorandum Opinion and Order*, CC Docket Nos. 00-218, et al., DA 02-1731, released July 17, 2002 ("Worldcom") at ¶ 117. Moreover, a transit provider is not even involved in any reciprocal compensation obligation since, in those specific situations where a transit provider is used in the exchange of local traffic, the reciprocal compensation arrangement is *solely* between the two carriers involved in the end user traffic. See id. at ¶ 544 citing *In the Matter of Texcom, Inc. v. Bell Atlantic Corp., Order on Reconsideration*, 17 FCC Rcd 6275, 6276-77 (¶ 4) (2002) ("Texcom").

overall compensation amounts by extrapolating from traffic studies and samples.”²⁷ What is the identity of the “parties” that the Commission in Footnote 2132 is referencing to the *First Report and Order*? That answer is clear from the *First Report and Order* text which Footnote 2132 references – the CMRS provider and LECs.

We conclude, however, that it is not necessary ***for incumbent LECs and CMRS providers*** to be able to ascertain geographic locations when determining the rating for any particular call at the moment that the call is connected. We conclude that parties may calculate overall compensation amounts by ***extrapolating from traffic studies and samples***.²⁸

The Small LEC Litigants note that the very same language used in Footnote 2132 of the *USF/ICC Transformation Order* and the *First Report and Order* exposes the fallacy of Verizon’s contentions.

So too, Verizon’s contention that, as an IXC, it effectively can take advantage of a CMRS provider status under Section 51.701(b)(2) runs directly contrary to the statutory requirement that reciprocal compensation arrangements must be made between two carriers. As the Act makes clear, the rate setting requirements for reciprocal compensation are those “associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” 47 U.S.C. § 252(d)(2)(A)(i). In its role as an IXC, Verizon is one of three carriers – the originating LEC, the IXC and the terminating carrier. Thus, the traffic that Verizon disputes falls outside the reciprocal compensation pricing requirement under Section 252(d)(2)(A)(i) since such traffic does not “originate on the network facilities of

²⁷ *USF/ICC Transformation Order* at ¶ 1007, fn. 2132 citing *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98 and 95-118, 11 FCC Rcd 15499 (1996) (“*First Report and Order*”) at 16017 (¶ 1044). The Small LEC Litigants note that “interMTA traffic” is unquestionably subject to access charges. See, e.g., *First Report and Order* at ¶ 1043.

²⁸ *Id.* at ¶ 1044 (emphasis added).

the” IXC. Once again, Verizon is improperly seeking to stand in the shoes of a CMRS provider. That result cannot be reconciled with the Act.

Verizon’s argument also conflicts with the very language on intercarrier compensation found in Section 51.701 of the Commission’s rules that Verizon claims its contention are based. Section 51.701(a) states, in part:

(a) The provisions of this subpart apply to Non-Access Reciprocal Compensation for transport and termination of Non-Access Telecommunications Traffic between LECs and other telecommunications carriers.²⁹

The regulations goes on to define Non-Access Telecommunications Traffic as follows:

(b) Non-Access Telecommunications Traffic. For purposes of this subpart, Non-Access Telecommunications Traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access* (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.³⁰

Thus, Sections 51.701(a) and (b) confirm that the pricing rules that apply to CMRS/LEC traffic and to Non-Access Telecommunications traffic specifically exclude traffic that is interstate or intrastate exchange access traffic. The Small LEC Litigants note that, if Verizon’s argument was correct that the intraMTA rule applies to IXC calls, the exception language included in Section 51.701(a) would not have been necessary.

Finally, in referencing Footnote 2133 of the *USF/ICC Transformation Order*, Verizon appears to assert that three court decisions support its assertion that intraMTA traffic carried by

²⁹ 47 C.F.R. §51.701(a).

³⁰ 47 C.F.R. §51.701(b) (emphasis added).

IXCs is subject to reciprocal compensation – *Alma Communications Co. v. Missouri Public Service Comm’n*, 490 F.3d 619 (8th Cir. 2007) (“*Alma*”); *Iowa Network Services v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); *Atlas Telephone Co. v. Oklahoma Corp. Commission*, 400 F.3d 1256 (10th Cir. 2005) (“*Atlas*”).³¹ As the Petitioners have correctly noted, these decisions are inapposite to the issue presented here,³² a conclusion confirmed by the United States District Court for the Northern District of Iowa.³³ Referencing these same three United States Court of Appeals decisions, that court stated:

Second, the federal appellate decisions on which Sprint relies also *do not* involve interpretation or policy analysis of FCC regulations regarding payment arrangements between LECs and IXC. The Eighth Circuit Court of Appeals explained that, in *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006) (*INS*), it had “held that an intermediary carrier was not required to pay access charges for cell-phone to land-line calls originating and terminating within a major trading area.” *Alma Commc’ns Co. v. Missouri Public Serv. Comm’n*, 490 F.3d 619, 625 (8th Cir. 2007) (summarizing the decision in *INS*). Nevertheless, the decision in *INS* turned on the following lacuna in FCC regulation, which a state agency had filled:

In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise. . . . As the IUB acted within its power under statute, we find no error.

INS, 466 F.3d at 1097. Thus, *INS* cannot be read as a judicial conclusion that the FCC’s regulations *require* reciprocal compensation between LECs and IXC for the traffic in question. Also, *INS* involved litigation over compensation between

³¹ See, e.g., VZ PA WD Complaint at 9 *quoting* USF/ICC Transformation Order, ¶ 1007, fn. 2133; see also VZ GA ND Amended Complaint at 23; VZ NE Complaint at 9-10; VZ NY ND Complaint at 10; VZ NY SD Amended Complaint at 11; VZ PA MD Complaint at 12.

³² See Petition at 22.

³³ See *Sprint Communs. Co., L.P. v. Butler-Bremer Mutual Tele Co. et al.*, 2014 U.S. Dist. Lexis 141758 (N.D. Iowa Oct. 6, 2014) (Memorandum Opinion and Order Regarding Defendants’ Motion to Dismiss or Stay) (the “*Iowa ND Decision*”).

two intermediary carriers, INS and Qwest, not between a LEC and an IXC or intermediary carrier. *Id.* at 1095 (noting that both Qwest and INS are intermediary carriers). *Alma Communications Company*, on which Sprint also relies, likewise did not involve litigation over compensation between a LEC and an IXC, but compensation between a LEC and a CMRS provider. *See* 490 F.3d at 620. The same is true of the out-of-circuit decision in *Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256, 1260 (10th Cir. 2005).³⁴

The Iowa court properly rejected the contention that *Atlas*, *Alma* and *INS* resolve the application of the intraMTA rule to IXC-LEC traffic since these decisions only addressed reciprocal compensation arrangements between a LEC and a CMRS provider. Any reliance on these three decisions by Verizon to support its claims regarding the application of the intraMTA rule for IXC-LEC traffic should be rejected.

The Small LEC Litigants are not trying to oppose or ignore the right of a CMRS provider to establish non-access telecommunications traffic reciprocal compensation arrangements or to propose using the transport arrangements that the CMRS provider deems appropriate. Nonetheless, Verizon, whether in its capacity as an IXC or a “transit provider,” has no legal right to establish a reciprocal compensation arrangement. And, even if Verizon did have such a right, Verizon has not followed the Section 252 requirements of the Act as to how such an arrangement can be requested and put into place.³⁵ The only service that Verizon has ordered remains exchange access. The Small LEC Litigants provided that service, properly invoiced for it, and, until the IXCs’ intraMTA theory was hatched, Verizon paid for the exchange access services it ordered and used. Now, Verizon apparently seeks to have this traffic magically recast as

³⁴ *Iowa ND Decision* at 8-9 (emphasis in original).

³⁵ To be sure, a reciprocal compensation arrangement is not automatically established. The Act provides the framework under which those arrangements can be established. *See* 47 U.S.C. § 252. Verizon’s efforts to unilaterally impose some alternative interconnection arrangement on the Small LEC Litigants cannot be reconciled with the Act’s framework.

“reciprocal compensation” traffic. That is a result the Commission simply cannot permit to occur.

B. Verizon’s Claims are Barred by the Filed Rate Doctrine.

As the Petitioners correctly note, the Filed Rate Doctrine precludes the relief that the IXCs, including Verizon, seek.³⁶ Until Verizon can demonstrate that, as an IXC, it has lawfully put into place a service arrangement distinct from the exchange access services it has ordered and received pursuant to the Small LEC Litigants’ respective exchange access tariffs, the Verizon claims are barred by the Filed Rate Doctrine.

As the Supreme Court has indicated,

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.³⁷

Moreover, “federal tariffs are the law, not mere contracts.”³⁸ And, when the doctrine applies, “it bars both state and federal claims,”³⁹ with “the obligation created by a filed

³⁶ See Petition at 31, 32-33.

³⁷ *American Tel. & Tel. Co. v. Central Office Tele., Inc.*, 524 U.S. 214, 222 (1998) quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97.

³⁸ *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) citing *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992).

³⁹ *Simon v. Keyspan Corp.*, 694 F.3d 196, 205 (2d Cir. 2012) (citation omitted).

tariff’ not being able to “be altered by an agreement of the parties”⁴⁰ or deviated from “upon any pretext.”⁴¹

The Filed Rate Doctrine is applicable to the Small LEC Litigants’ respective interstate tariffs.⁴² The Filed Rate Doctrine is also applicable in the context of each of the Small LEC Litigants’ respective intrastate tariffs in accordance with relevant case law in the States of Georgia,⁴³ Nebraska⁴⁴ and New York⁴⁵ and in the Commonwealth of Pennsylvania.⁴⁶

That Verizon, a sophisticated IXC with years of operational experience, is bound by the Filed Rate Doctrine cannot seriously be questioned. Verizon knows the nature of the service it ordered from LECs.⁴⁷ Since under the Filed Rate Doctrine, “[a]ll customers are ‘conclusively

⁴⁰ *Ill. Bell Tel. Co., Inc. v. Global NAPs Ill., Inc.*, 551 F.3d 587, 593 (7th Cir. 2008) (citation omitted).

⁴¹ *Maislin Indus., U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) quoting *Louisville, supra* at 97.

⁴² See generally 47 U.S.C. § 203.

⁴³ See, e.g., *Taffet v. S. Co.*, 967 F.2d 1483, 1490 (11th Cir. 1992) (applying Georgia law and noting “the filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme.”).

⁴⁴ See, e.g., *AT&T Commc’ns of Midwest, Inc. v. Nebraska Pub. Serv. Comm’n*, 811 N.W.2d 666, 671 (Neb. 2012) (noting that the filed rate doctrine has been adopted in Nebraska).

⁴⁵ See, e.g., *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1169 (S.D.N.Y. 1996) (“That a common carrier may charge no more and no less than its filed rate necessarily means that a subscriber may pay no more and no less than the filed rate, regardless of equitable circumstances suggesting otherwise.”); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2^d Cir. 1994) (“The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable.”)

⁴⁶ See, e.g., *In re Pennsylvania Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 682 (E.D. Pa. 2009) (applying Pennsylvania law and finding filed rate doctrine barred a claim for money damages).

⁴⁷ The binding tariff relationship between Verizon and each of the Small LEC Litigants is established either through Verizon actually ordering service or “constructively” ordering the service. As to the latter, the status of “constructive ordering” has been recognized, which

presumed' to have constructive knowledge of the filed tariff under which they receive service,"⁴⁸ Verizon's voluntary use of the tariffed exchange access arrangements it has in place with each of the Small LEC Litigants allows for access charges to be applied to the traffic for which Verizon must pay when it uses those arrangements.

The tariffs at issue that have been filed by the Small LEC Litigants contain terms and conditions that otherwise established the methods by which access charges are assessed under those specific tariffs. Those methods are based on either actual measurement (the Small LEC Litigants understand that Verizon is not challenging the overall minutes of use of traffic in question) or the use of certain factors that jurisdictionalize, for example, between interstate and intrastate traffic or, for intrastate access traffic, Voice over Internet Protocol ("VoIP") traffic and non-VoIP traffic. These tariffs either do not have factors for intraMTA traffic or, by their terms, explicitly exclude intraMTA traffic from the scope of traffic covered by the tariffs. To the extent that Verizon claims (either directly or indirectly) that the tariffs must be applied as if such intraMTA factors are present in the terms, the Filed Rate Doctrine precludes Verizon's efforts to alter the terms of the tariffs.

provides that affirmative consent is not necessary to create a carrier-customer relationship between IXCs and LECs when a carrier is interconnected with other carriers, can expect to receive access services, and fails to take reasonable steps to prevent the receipt of access services. *See, e.g., Advantel, LLC v. Sprint Communications, Co.*, 118 F.Supp.2d 680, 685 (E.D. Va 2000); *In the Matter of United Artists Payphone Corp. v. New York Tel. Co. and AT&T*, Memorandum Opinion and Order, File Nos. E-90-181, E-90-182, 8 FCC 5563, 5565-66 (1993). In this instance, Verizon is, for example: (1) sufficiently able to terminate to or receive access traffic from each of the Small LEC Litigants' networks; (2) can expect to receive access services; and (3) has not demonstrated that it has taken or desires to take reasonable steps to prevent that access.

⁴⁸ *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir. 1998) (citing *Kansas City Southern Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913)).

If Verizon desires to change its tariffed relationship on a global basis, it can seek to alter those tariffs through a rulemaking petition filed with the FCC. Verizon cannot, however, unilaterally alter the tariffed terms and conditions and impose them upon any of the Small LEC Litigants. The Filed Rate Doctrine bars that conduct.

C. The Voluntary Payment Doctrine Precludes any Action by Verizon to Seek Retroactive Refunds of Charges.

The Small LEC Litigants respectfully submit that the Voluntary Payment Doctrine precludes any request for retroactive refunds of the charges that Verizon disputes. This Doctrine has been summarized as barring the “recovery of payments made with full knowledge of the facts, even if made under a mistake of law.”⁴⁹ The Voluntary Payment Doctrine is applicable to the operations of each of the Small LEC Litigants. Courts in Georgia,⁵⁰ Nebraska,⁵¹ New

⁴⁹ *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 292 A.D.2d 25, 27, 740 N.Y.S.2d 396 (2002), *aff’d*, 760 N.Y.S.2d 726; *see also* Petition at 31, fn.82.

⁵⁰ *See, e.g., Liberty Nat. Life Ins. Co. v. Radiotherapy of Georgia, P.C.*, 557 S.E.2d 59, 63 (Ga. App. Ct. 2001) (“As a general rule, a payment made through ignorance of law and in the absence of fraud is deemed voluntary and is not recoverable.”) (citation omitted); *see also Robbins v. Scana Energy Mktg., Inc.*, No. 1:08-CV-640-BBM, 2008 WL 7724171, at *4 (N.D. Ga. June 13, 2008) (dismissing action pursuant to Georgia’s voluntary payment statute); Ga. Code § 13-1-13 (“Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered unless made under an urgent and immediate necessity therefor or to release person or property from detention or to prevent an immediate seizure of person or property.”).

⁵¹ *See, e.g., Robb v. Cent. Credit Corp.*, 169 Neb. 505, 515, 100 N.W.2d 57, 63 (1959) (quoting *Meyer v. Rosenblatt & Son*, 119 Neb. 471, 229 N.W. 771, 772 (1930)) (“Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily, recover it back on the ground of its invalidity.”); *see also City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 866, 809 N.W.2d 725, 743 (2011) (“Normally, a plaintiff cannot recover money voluntarily paid under a claim of right to payment if the plaintiff knew of facts that would permit the plaintiff to dispute the claim and withhold payment.”) (citation omitted).

York,⁵² and Pennsylvania⁵³ have found that the Voluntary Payment Doctrine applies to bar recovery of payments made with full knowledge of the facts, even if at times made under a mistake of law.

Because Verizon voluntarily paid exchange access charges, it may not now seek retroactive payment of charges for the very service that it ordered and used. As the Petitioners state, “[t]he IXC’s likewise *chose* to route the traffic over Feature Group D facilities, *chose* not to provide notification to LECs, and *chose* to pay tariffed access charges for years without dispute.”⁵⁴ The Small LEC Litigants agree. Because Verizon voluntarily used and paid for the access services that have been provided to it by each of the Small LEC Litigants, its claims for retroactive refunds must be rejected. Even if Verizon can demonstrate that it made those payments under a mistaken assumption as to its legal obligations, the Voluntary Payment Doctrine supports the conclusion that no claims regarding retroactive refunds of the charges that have been paid by Verizon can or should be countenanced by the Commission.

⁵²See, e.g., *U.S. ex rel. Feldman v. City of New York*, 808 F. Supp. 2d 641, 657 (S.D.N.Y. 2011) (“Under New York common law, the voluntary payment doctrine precludes a party from recovering voluntary payments ‘made with full knowledge of the facts’ if the party’s ignorance of its contractual rights and obligations resulted from a ‘lack of diligence.’”); *Dillon*, 292 A.D.2d at 27 (noting “[t]he common-law voluntary payment doctrine bars recovery of payments made with full knowledge of the facts, even if made under a mistake of law,” but that the legislature modified the traditional rule so that relief cannot be denied merely because the mistake is one of law, so as to permit recovery where justified by analogy with mistakes of fact).

⁵³See, e.g., *Parsons v. City of Philadelphia*, No. CIV.A. 13-0955, 2014 WL 6973024, at *2 (E.D. Pa. Dec. 9, 2014) (quoting *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 661 (Pa. 2009) (“Under the voluntary payment defense, ‘one who has voluntarily paid money with full knowledge, or means of knowledge of all the facts, without any fraud having been practiced upon him . . . cannot recover it back by reason of the payment having been made under a mistake or error as to the applicable rules of law.’”)).

⁵⁴See Petitioner at 31. Moreover, assuming the existence of CMRS traffic, the Small LEC Litigants also agree with Petitioners that CMRS providers also voluntarily chose to avoid similar actions as the IXC’s where an applicable interconnection agreement was in place between the LEC and the CMRS provider that defined how traffic was to be routed. See *id.*

IV. IF THE COMMISSION ADOPTS ANY ASPECT OF THE IXCS' CLAIMS REGARDING THE INTRA-MTA RULE, THE PUBLIC INTEREST DEMANDS THAT THE COMMISSION MUST ADDRESS SPECIFIC ISSUES THAT ARISE AS A RESULT

For all of the reasons stated above, the Small LEC Litigants respectfully submit that there is no rational or justifiable basis for the contentions raised by Verizon and other IXCs. When the IXCs have ordered and used services provided by a LEC under its exchange access tariffs, the FCC's intraMTA rule cannot provide any basis for the IXCs' refusal to pay for all of the exchange access they have used historically or currently. The Small LEC Litigants are properly concerned, however, about the litigious propensities of the IXCs, as reflected in the dozens of lawsuits that Sprint and Verizon have filed across the United States and that are now consolidated in the United States District Court for the Northern District of Texas in Dallas, Texas, coupled with the self-help noted by Sprint and Level 3 within the Petition.⁵⁵ In the absence of the Commission granting the Small LEC Litigants' requested relief, the Commission will be faced with resolving numerous additional issues. But if the Commission does not reject Verizon's contentions, the public interest demands that the Commission address the following issues if for no other reason than the Commission's silence will only foster inefficient use of resources since, as noted by the Petitioners, providing credence to the IXC's concocted intraMTA theory will result in "dozens of questions that will need to be resolved on a case-by-case basis by the Commission and/or various courts."⁵⁶

First, as noted by the Petitioners, the Commission will need to address the "equity and fairness"/"manifest injustice" standards vis-à-vis any claimed retroactive application of the

⁵⁵ See, fn. 1, *supra* and Petition at 35-38, respectively.

⁵⁶ *Id.* at 9.

intraMTA rule as may be claimed by the IXCs.⁵⁷ The Small LEC Litigants support the positions taken by the Petitioners in this regard and need not repeat those positions here.⁵⁸ To be sure, however, the need for addressing these issues need only arise should the Commission *not* make clear that any application of the intraMTA rule cannot possibly apply to the access services that the IXCs used and continue to use.

Second, the Small LEC Litigants also fully agree with the Petitioners that the Commission would need to address and resolve a variety of practical issues that would emanate from the potential establishment of the IXCs' claimed rights as a non-CMRS provider to take advantage of the intraMTA rule.⁵⁹ Although the Petitioners have underscored certain of these issues, the Small LEC Litigants specifically note that Commission guidance should explain the legal basis for establishing any such right of an IXC and, if applicable, any transformation of an IXC into a transit carrier. Any such explanation should identify the specific section of the Act that supports any such new-found legal right; to date the IXCs have failed to demonstrate that any provision of the Act would sustain the legal right they claim exists.⁶⁰ Moreover, any guidance from the Commission should address the need for verifiable information to prove the existence of the intraMTA traffic that the IXCs claim they carry.⁶¹ As the Petitioners properly note, the burden for producing and defending that information should be placed directly on the

⁵⁷ See *id.* at 34-35 and fn. 91 and fn. 93, respectively.

⁵⁸ See *id.* at 34-35.

⁵⁹ See *id.* at 9-10.

⁶⁰ Such analysis would, by necessity, need to be reconciled with the Commission's rulings in *Worldcom* and in *Texcom*. See fn. 26, *supra*.

⁶¹ See Petition 10.

IXCs.⁶² Presumably Verizon did not file this litigation without possessing the data necessary to sustain its claims. Consistent with the *USF/ICC Transformation Order* ruling in the context of phantom traffic, Petitioners are correct that it is Verizon (as well as any of the other IXCs) that must demonstrate that its traffic data is accurate.⁶³

Third, the Small LEC Litigants respectfully submit that the Commission must also address the impact of any decision granting the IXCs some new-found intraMTA traffic right – whether it is prospective in nature or includes some form of retroactive application – on the ROR recovery mechanism (the “ROR RM”),⁶⁴ the results from which are a portion of the annual ROR Universal Service Fund (“USF”) budget of \$2 billion dollars.⁶⁵ The need for the Commission to address this issue would arise since the vast majority of the Small LEC Litigants are ROR companies and, it would appear, so also are many of the Petitioners.⁶⁶ Because of the uncertainty as to the alleged quantity of intraMTA traffic that has been carried by the IXCs (coupled with other entities claiming any such new found right) and may be carried in future years, the impact of any action on the current ROR \$2 billion USF budget cap must be addressed.

⁶² See *id.* 19-20 and fn. 54.

⁶³ See *id.* at 20, fn. 54 citing *USF/ICC Transformation Order* at ¶ 732 (analogous situation of obligation to provide information where phantom traffic is involved).

⁶⁴ See, e.g., *USF/ICC Transformation Order* at ¶¶ 891-92, 896-99; see also 47 C.F.R. § 51.917.

⁶⁵ The \$2 billion USF budget for ROR carriers was established by the Commission in the *USF/ICC Transformation Order*. See, e.g., *USF/ICC Transformation Order* at ¶ 126.

⁶⁶ The Small LEC Litigants note that a number of the Petitioners appear to be smaller rural LECs such as many of the Small LEC Litigants. See Petition, Exhibit A: LEC Petitioners at A-5 to A-6 (LICT Corporation entities), A-8 to A-11 (company names of the “Iowa RLEC Group” and the “Missouri RLEC Group”).

To be sure, the Commission has made clear that the annual \$2 billion ROR budget included “intercarrier compensation recovery” which is the ROR RM.⁶⁷ The Commission has also made clear that, “if actual program demand exceeded \$4.5 billion for any consecutive four quarters, the Bureau would be required to initiate a process to return expenditures to budgeted levels.”⁶⁸ Moreover, the Commission stated that the projected demand provided by the Universal Service Administrative Company (“USAC”) for “rate-of-return carriers was at an annualized rate of \$2.014 billion in 2013, with actual disbursements of \$1.958 billion.”⁶⁹ In explaining the budget process the Commission has also noted that:

[d]isbursements often differ from projected demand and actual support, because disbursements take into account true-ups for past overpayments and underpayments, which are driven in large part by carriers filing corrected data. Disbursements were lower in 2013 than USAC’s projections because there were overpayments in 2012 that resulted in downward adjustments to carrier disbursements in early 2013. Disbursements for the third and fourth quarters of 2013 exceeded \$2 billion on an annualized basis (\$2.018 billion in the third quarter and \$2.023 billion in the fourth quarter).⁷⁰

Unquestionably, the Commission’s own statements acknowledge the pressures on the USF budget for ROR carriers. In light of the on-going and true-up demands that could arise on the ROR RM should any credence be given to the IXC’s position regarding the intraMTA rule, the public interest requires that the Commission address how the ROR RM and the ROR budget would correspondingly be addressed. The Small LEC Litigants also respectfully submit that the

⁶⁷ *In the Matter of Connect America Fund et al., Report and Order, Declaratory Ruling, Order, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 *et al.*, FCC 14-54, released June 10, 2014 at ¶ 273 (footnote omitted).

⁶⁸ *Id.*, ¶ 273 fn. 484, citing *USF/ICC Transformation Order* at ¶ 563.

⁶⁹ *Id.* at ¶ 273 citing USAC FCC Quarterly Filings, 2013 First, Second, Third, and Fourth Quarter Appendices, “HC01- High Cost Support Projected by State by Study Area” (showing quarterly projections that amount to an annualized projected demand of \$2.014 billion).

⁷⁰ *Id.* at fn. 485.

Commission must include an explanation of the process and procedures for the determination of whether the ROR budget established and authorized in the *USF/ICC Transformation Order* envisioned the very expansion of the intraMTA rule that the IXC's claim (albeit improperly) should be made.

The requested explanation is appropriate and fully justified. Since the ROR budget of \$2 billion includes the recovery from the ROR RM as well as the High Cost Loop Support, Interstate Common Line Support and Safety Net Additive mechanisms,⁷¹ any true-up of past ROR RM or going forward increases in ROR RM will affect the recovery levels of the other ROR programs administered under that ROR USF budget. This impact must be explained by the Commission and understood by ROR carriers. Without an explanation, the integrity of both the Commission's decision-making process and the rules and the policies arising from the *USF/ICC Transformation Order* would be undermined as funding gaps between the Commission's anticipated outcomes regarding the ROR RM and the actual outcomes vis-à-vis the ROR RM impact on the ROR USF budget would be at issue. Further, the public interest demands that an explanation be provided. ROR companies like the Small LEC Litigants must be provided an opportunity to properly understand the impact of any application of the IXC's concocted theory of the intraMTA rule, the justification for the additional windfall that the IXC's may receive,⁷² and the impact on the decisions made in the *USF/ICC Transformation Order*. The Commission needs to explain whether the balance created by it regarding the level of recovery to be afforded under the ROR RM contemplated that the IXC's claimed expansion of the intraMTA rule.

⁷¹ See, e.g., 47 C.F.R. §§ 54.1301 *et seq.* and 54.901, 54.1304, respectively.

⁷² As noted by the Petitioners, the IXC's have not indicated that "they would pass recovered access charges through to *their* customers, even though IXC's were never intended as the intraMTA rule's beneficiaries." Petition at 34 (emphasis in original; footnote omitted).

Although the Petitioners have noted that these practical issues may need to be addressed by the “Commission and/or various courts,”⁷³ the Small LEC Litigants respectfully suggest that the Commission should, *in the first instance*, provide guidance on these identified issues since it would be the Commission that, assuming *arguendo*, would be blessing the structure that the IXC’s are seeking. The sheer number of LECs impacted by these issues necessitates Commission guidance, if for no other reason than to avoid the unnecessary expenditure of resources by the Commission and smaller carriers vis-à-vis the much larger IXC’s at issue in this proceeding. Having raised their theory on expanding (albeit improperly) the intraMTA rule, for example, the IXC’s should not be heard to complain that Commission guidance on the ground rules associated with moving forward is inappropriate and/or unnecessary.

V. CONCLUSION

It is an understatement when the Petitioners suggested that the instant efforts by the IXC’s represent a “needless controversy initiated by these IXC’s.”⁷⁴ Having already received a windfall from the use of the terminating LEC’s networks at rates that are being reduced to zero, the IXC’s are simply trying to concoct a new theory to add to that windfall at the expense of the LECs and their end users, together with the possibility of the IXC’s attempting to retain a further windfall associated with the retention of toll revenue associated with such traffic that could be reclassified.

⁷³ See *id.* at 9.

⁷⁴ *Id.* at 8.

For the reasons stated herein, the Small LEC Litigants support the Petition and respectfully request that Commission reject the IXCs' claims outright and grant the Petition in all respects and with due dispatch.

Date: February 9, 2015

Respectfully submitted,

**Multi-State Small Local
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Attachment A

Multi-State Small Local Exchange Carrier Litigants

Georgia

Alma Telephone Company
Bulloch Telephone Cooperative
Darien Telephone Company
Ellijay Telephone Company
Hart Telephone Company
Pembroke Telephone Company, Inc.,
 d/b/a Pembroke Advanced Communications, Inc.
Pineland Telephone Cooperative
Plant Telephone Company dba Plant Telecommunications
Planters Rural Telephone Cooperative, Inc.
Progressive Telephone CO-OP
Public Service Telephone Company

Nebraska

Arlington Telephone Company
The Blair Telephone Company
Eastern Nebraska Telephone Company
Great Plains Communications, Inc.
The Hamilton Telephone Company
Huntel Cablevision, Inc.
The Nebraska Central Telephone Company
Northeast Nebraska Telephone Company
Rock County Telephone Company

New York

The Champlain Telephone Company,
Delhi Telephone Company
Empire Telephone Corporation
The Middleburgh Telephone Company
Ontario Telephone Company, Inc.

Pennsylvania

North Penn Telephone Company
The North-Eastern Pennsylvania Telephone Co.
Palmerton Telephone Company
South Canaan Telephone Company
Venus Telephone Corporation